here and in the court below and the decision of the trial judge restored.

Appeal allowed.

Solicitors: *Chan Kam Foo & Associates; Murphy & Dunbar.*

MOHAMED RAZIP v. PUBLIC PROSECUTOR ROSLI BIN AMAT v. PUBLIC PROSECUTOR KAMBALI BIN TAKIRAN v. PUBLIC PROSECUTOR

[C.Cr.A. (Wee Chong Jin C.J., Thean & P. Coomaraswamy JJ.) October 1, 1987]

[Singapore – Criminal Appeals Nos. 3, 4 & 5 of 1986]

Criminal Procedure – Bail – Nature of an order on a bail application – Whether Court of Criminal Appeal can hear an appeal from such an order – Criminal Procedure Code (Cap. 68, 1985 Ed.), ss. 217(1), 241 & 354 – Supreme Court of Judicature Act (Cap. 322, 1985 Ed.), ss. 44 & 51.

The three accused in these criminal appeals were charged with the offence of rape under section 376 of the Penal Code. Rape is a non-bailable offence. They applied to the High Court to be admitted to bail pending their trial. These applications were made pursuant to section 354 of the Criminal Procedure Code (Cap. 68, 1985 Ed.). Bail was refused. The three accused appealed.

Held, dismissing the appeals: (1) the jurisdiction of the Court of Criminal Appeal is to hear appeals against orders of finality *i.e.* those resulting in conviction and sentence, or acquittal;

(2) an order made on a bail application, being interlocutory and tentative in nature, does not fall within the purview of section 44 of the Supreme Court of Judicature Act and is thus a non-appealable order.

Cases referred to:

(1) *Re Balasundara Pavalar* A.I.R. 1951 Madras 7.
(2) *Gng Eng Hwoo* v. *Regina* [1954] M.L.J. 256.
(3) *Public Prosecutor* v. *K. Suppiah and 14 Ors.* (Magistrates' Appeal No. 19 of 1967 – unreported).

COURT OF CRIMINAL APPEAL.

S. Vellupillai for the appellant in Criminal Appeal No. 3.

Peter Fernando for the appellant in Criminal Appeal No. 4.

N. Vijaykumar for the appellant in Criminal Appeal No. 5.

Lawrence Ang (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J.: *Factual Background.* The three accused in these Criminal Appeals were charged with the offence of rape under section 376 of the Penal Code. Rape is a non-bailable offence, as provided in Schedule A to the Criminal Procedure Code. The preliminary inquiry into charges was held in the Subordinate Courts on December 19, 1985 at the conclusion of which the accused were committed for trial in the High Court.

Counsel for each of the accused then applied, by way of Criminal Motions, to the High Court for the accused to be admitted to bail pending their trial. These applications were made pursuant to what is now section 354 of the Criminal Procedure Code (1985 Revised Edition). (All references to statutory provisions hereinafter shall be to the 1985 Revised Edition of the Statutes.) The applications came before Sinnathuray J. who refused to grant bail but directed an early trial instead.

The three accused appealed against the decision of the learned judge. We dismissed all the appeals. We now give our reasons.

Is an order on a bail application appealable?

Section 354 CPC is as follows:

"354(1) The High Court may, in any case whether there is an appeal on conviction or not, direct that any person shall be admitted to bail or that the bail required by a police officer or Magistrate's Court or District Court shall be reduced or increased.

(2) The High Court may at any stage of any proceeding under this Code cause any person who has been released under this section to be arrested and may commit him to custody."

In Singapore, there is no general right of appeal in criminal cases except such as is provided by law. This is made clear by section 241 Criminal Procedure Code which provides:

"241. No appeal shall lie from a judgment, sentence or order of a criminal court except as provided for by this Code or by any other law for the time being in force."

The Criminal Procedure Code contains no provision for an appeal against an order of the High Court made under section 354 Criminal Procedure Code. The appellants can only appeal under "any other law for the time being in force"

We now turn to the Supreme Court of Judicature Act. Section 44 SCJA, which spells out the jurisdiction of the Court of Criminal Appeal to

entertain appeals from the High Court, reads:

"44(1) The Court of Criminal Appeal shall have jurisdiction to hear and determine any appeal against *any decision made by the High Court in the exercise of its original criminal jurisdiction,* subject nevertheless to the provisions of this Act or any other written law regulating the terms and conditions upon which such appeals may be brought.

(2) An appeal by a person convicted shall be either against the conviction or against the sentence or against both :

Provided that where an accused person has pleaded guilty and been convicted on such plea there shall be no appeal except as to the extent or legality of the sentence.

(3) An appeal by the Public Prosecutor shall be either against the acquittal of an accused person or against the sentence imposed upon an accused person by the High Court.

(4) An appeal may lie on a question of fact or a question of law or on a question of mixed fact and law.

(5) The Court of Criminal Appeal shall also have jurisdiction to hear and determine matters brought before it in accordance with section 59 or 60."

Sections 59 and 60 SCJA have no relevance to the proceedings before us. The key words in section 44(1) are "any decision made by the High Court in the exercise of its original criminal jurisdiction"

Section 44, before it was repealed and substituted in its present form by the Supreme Court of Judicature (Amendment) Act 1973, was in the following terms :

"44(1) The Court of Criminal Appeal shall have jurisdiction to hear and determine any appeal by a person convicted by the High Court in the exercise of its original criminal jurisdiction, subject nevertheless to the provisions of this or any other written law regulating the terms and conditions upon which such appeals may be brought.

(2) An appeal by a person convicted shall be either against the conviction or against the sentence or against both :

Provided that where an accused person has pleaded guilty and been convicted on such plea there shall be no appeal except as to the extent or legality of the sentence.

(3) An appeal may lie on a question of fact or a question of law or on a question of mixed fact and law.

(4) The Court shall also have jurisdiction to hear and determine matters brought before it in accordance with the provisions of section 58, 59 or 60 of this Act."

The Amendment Act of 1973 also made certain changes to sections 42, 46, 49, 54 and 58 SCJA. For example, section 42 was altered so that "appellant" includes the Public Prosecutor.

It is plain from the legislative history of all these sections that the words "any decision made by the High Court" in section 44(1) SCJA were inserted to accommodate appeals by the Public Prosecutor, thereby enlarging the jurisdiction of the Court of Criminal Appeal in that respect. The words were, in our opinion, not inserted as a "catch-all" phrase. They must be read in the context of the other provisions. In section 44(2), the appellant is the "person convicted" and the appeal is against conviction, or sentence, or both. In section 44(3), the appellant is the Public Prosecutor and the appeal is against acquittal, or sentence. Even when questions of law are referred to the Court of Criminal Appeal under section 59 or 60 SCJA, they are done only at the conclusion of the trial or the appeal, as the case may be. The only logical conclusion, therefore, is that the jurisdiction of the Court of Criminal Appeal is to hear appeals against *orders of finality, i.e.* those resulting in conviction and sentence, or acquittal.

What then is the nature of an order made on an application for bail? It is helpful to refer to *Re Balasundara Pavalar.*[1] There the question before the Madras High Court was whether a convicted person, whose application for bail pending his appeal had once been rejected, could renew that application for the same relief. The court decided that there was no prohibition against entertaining such an application. Govinda Menon J., who delivered the judgment of the court, said (at p. 9 of the report) :

"It has to be remarked that an order on a bail application does not finally determine the guilt or innocence of a person accused or convicted of an offence. All that such an order postulates is that pending an enquiry or trial, and in the case of a convicted person, pending an appeal by him, it is not absolutely necessary that his liberty should be curtailed.

.....

It seems to us, therefore, that an order on a bail application is nothing more than an interlocutory and tentative expression of the conclusion as to whether a person should be set at large pending trial, or disposal of his appeal, and nothing more."

The court then went on to consider (at p. 10 of the report) whether an order rejecting the bail application amounted to a "judgment" under section 369 of the Indian Criminal Procedure Code, which prohibits judgments from being altered or reviewed once they have been signed :

"Such a reconsideration will be prohibited only if the order already rejecting the bail application amounts to a judgment under the Criminal Procedure Code. It need hardly be stated that the Criminal Procedure Code does not define the word "judgment" as is done in the Code of Civil Procedure. One of us had occasion to refer to it recently in the case reported in *Suryarao* v. *Sathiraju*, 1948 M.W.N. Cr. 65 : (AIR (35) 1948 Mad. 510 : 49 Cr. L.J. 754). Reference was made there to the definition of 'judgment' in *Halsbury's Laws of England*, Hailsham Edn., Vol IX, paras 260 to 264 as meaning a final order in a trial terminating in the conviction or acquittal of the accused. That this is the meaning of the word 'judgment' even under the Criminal Procedure Code is evident from the decisions quoted therein , ... If by the word 'judgment' is understood a final order in a trial terminating in the conviction or acquittal of the accused, it necessarily follows that a tentative order directing the release of an accused person pending the hearing of his appeal by an appellate court cannot be termed a 'judgment' under the Code. Therefore, s.369, Criminal P.C., can have no application to a bail application."

We agree with the observations quoted above. It therefore follows that an order made on a bail application, being interlocutory and tentative in nature, does not fall within the purview of section 44 of the SCJA and is thus a non-appealable order.

It is also not a "judgment" under section 217(1) Criminal Procedure Code which is our equivalent of section 369 of the Indian Criminal Procedure Code. Section 217(1) Criminal Procedure Code reads:

"217(1) No court other than the High Court, when it has recorded its judgment, shall alter or review the judgment."

The prohibition against alteration or review does not apply to the High Court in any event. Accordingly, successive applications for bail can be made in the High Court. But once an application for bail has been rejected, the court would be extremely reluctant in granting bail on subsequent applications, unless there has been a material change of circumstances or new facts have since come to light.

We would add that what we have said applies equally to the Subordinate Courts. We are of the view that an order made on a bail application by a Subordinate Court does not come within the meaning of the words "any judgment, sentence or order pronounced by any District Court or Magistrate's Court in a criminal case or matter" contained in section 247 Criminal Procedure Code. It is certainly not a judgment or sentence, and neither is it an "order". In *Gng Eng Hwoo* v. *Regina*[2] Whitton J. had this to say about the word "order" appearing in a subsection similar in terms to the present section 241 Criminal Procedure Code:

"I have been unable to find any definition of the word 'order' which appears to fit its use in this section, but my research into the matter has led me to the conclusion that in connection with a criminal cause or matter the word is confined, broadly speaking, to those *final* decisions of a court which affect parties to the proceedings in respect of their person or property."

We have already said that an order made on a bail application is interlocutory and tentative in nature.

That was apparently why the Public Prosecutor's appeal in *Public Prosecutor* v. *K. Suppiah and 14 Others*[3] was dismissed. There, the accused were charged in a Magistrate's Court with non-bailable offences on February 2, 1967. The magistrate rejected the accused's application for bail, and ordered that they be remanded until February 11, 1967. On February 8, 1967, the accused again appeared before the magistrate to renew their application for bail. It was common ground that the basis for opposing bail no longer existed. However, the prosecution raised a preliminary objection that the magistrate had no jurisdiction to entertain the fresh application for bail on the grounds that the magistrate, having made the remand order effective till February 11, 1967, was *functus officio* until that date, and that the matter was *res judicata*. The defence counsel urged the magistrate to act in accordance with the prevailing practice that an application for bail could be renewed again and again. The magistrate ruled that he had the jurisdiction to hear the fresh application for bail and granted bail. Against that decision the prosecution appealed to the High Court, which, in our opinion, rightly dismissed it.

Likewise, therefore, successive applications for bail can be made in the Subordinate Courts, subject to the same principle that we have stated. This accords both with the law as well as with time-honoured practice.

There is one final point. The Court of Criminal Appeal can entertain bail applications pending appeal from persons convicted by the High Court in the exercise of its original criminal jurisdiction.

This is allowed under section 51(1) SCJA which provides :

"51(1) Except in the cases mentioned in subsection (3), no appeal shall operate as a stay of execution, but the trial court or the Court of Criminal Appeal may stay execution on any judgment, order, conviction or sentence pending appeal on such terms as to security for the payment of any money or the performance or non-performance of any act or the suffering of any punishment ordered by or in such judgment, order, conviction or sentence as to the court may seem reasonable."

When an accused has been tried and convicted by the High Court and wishes to apply for bail pending appeal, he should in the first instance apply to the trial court. If the trial court refuses bail, he may apply to the Court of Criminal Appeal. He may of course choose to make a second application to the trial court instead of applying to the Court of Criminal Appeal. We again emphasise here the principle to be applied in hearing a second or any subsequent application, namely, that there should be a material change of circumstances or that new facts have since come to light, before such an application will be granted. The applicant and his counsel should bear this in mind before contemplating such an application.

Order accordingly.

Solicitors: *Donaldson & Burkinshaw; Leo Fernando; Vijay & Co.*

DIMPEX GEMS (SINGAPORE) PTE. LTD. v. YUSOOF DIAMONDS PTE. LTD.

[A.C.J. (Thean J.) June 26, 1987]
[Singapore – Suit No. 4353 of 1986]

Contract – Illegality – Claim for sums owing – Defence of illegality – Mere knowledge of illegality on plaintiffs' part – No defence to plaintiffs' claim – Order granting unconditional leave to defend by Assistant Registrar varied on appeal.

Civil Procedure – Order 14 application – Defence of illegality of contract – Unconditional leave to defend – Order varied on appeal.

The plaintiffs claimed for $340,818.67 against the defendants for the price of diamonds and gems sold and delivered by the plaintiffs to the defendants. The defendants admitted the claim but contended that the contracts for the sale of diamonds and gems to them were tainted with illegality. The defendants claimed that the diamonds and gems sold to the defendants were meant for sale in Peninsular Malaysia and that they were to be taken there without any declaration and payment of customs duty due to the Malaysian authority. That was the only defence raised and it was submitted on behalf of the defendants that that was a triable issue.

The learned Assistant Registrar, who heard the application, gave unconditional leave to the defendants to defend the action and against that decision, the appeal was brought.

Held: (1) the decision of the learned Assistant Registrar must be varied and leave be given to the defendants to defend the action on condition that the defendants furnish a bank guarantee for the sum of $340,818.67 within 21 days from the date of judgment, in default of which the plaintiffs would be at liberty to enter final judgment against the defendants for the sum claimed with interest and costs;

(2) mere knowledge on the part of the plaintiffs that the diamonds and gems sold to the defendants would be exported illegally by the defendants to Malaysia does not constitute a defence to the claim by the plaintiffs.

Cases referred to:

(1) *Fielding & Platt Ltd.* v. *Selim Najjar* [1969] 1 W.L.R. 357.
(2) *Foster* v. *Driscoll* [1929] 1 K.B. 470, 518.

APPEAL FROM REGISTRAR'S DECISION.

M. Karthigesu (*Alan Wong* with him) for the plaintiffs/appellants.

Kalamohan s/o R. Pillai for the defendants/respondents.

Cur. Adv. Vult.

Thean J.. This was an appeal against the decision of the Assistant Registrar given on March 9, 1987 in which, on an application under Order 14 of the Rules of Supreme Court by the plaintiffs for judgment, he gave the defendants unconditional leave to defend the action.

The plaintiffs' claim is for a sum of $340,818.67, being the balance of the price of diamonds and gems sold and delivered by the plaintiffs to the defendants. There was no dispute on the amount owing, as the defendants admitted the claim. However, the defendants contended that the contracts for the sale of diamonds and gems to them were tainted with illegality and the illegality arose in this way. The plaintiffs were well aware that the diamonds and gems sold to the defendants were meant for sale in Peninsular Malaysia and that they were to be taken there without any declaration and payment of customs duty due to